

IN THE
Supreme Court of the United States Court, U. S.
OCTOBER TERM, 1996
F I L E D

NOV 25 1996

CLERK
Petitioners

RACHEL AGOSTINI, *ET AL.*,

v.

BETTY-LOUISE FELTON, *ET AL.*

CHANCELLOR OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, *ET AL.*,

Petitioners

v.

BETTY-LOUISE FELTON, *ET AL.*

On Petitions for a Writ of Certiorari
to the United States Court of Appeals for
the Second Circuit

**BRIEF OF THE NATIONAL JEWISH
COMMISSION ON LAW AND PUBLIC AFFAIRS
("COLPA") AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICUS CURIAE*

The *amici* are national organizations that represent the American Orthodox Jewish community. We have consistently supported the principle of fair and even-handed

treatment for children who attend religious schools and for the parents who are obligated, for reasons of conscience, to enroll their children in such schools. The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed *amicus* briefs on behalf of these children and parents in numerous cases considered by this Court, including *Board of Education v. Allen*, 392 U.S. 236 (1968); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and, of course, *Aguilar v. Felton*, 473 U.S. 402 (1985).

The individual organizations represented by COLPA are:

(1) Agudath Harabonim of the United States and Canada is the oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

(2) Agudath Israel of America is a national Orthodox Jewish public interest organization with chapters in numerous Jewish communities throughout the United States and Canada. It is dedicated to advancing Jewish social, religious and educational concerns.

(3) National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.

(4) The Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400

members. It has for many years been involved in a variety of religious, social and educational areas affecting Orthodox Jews.

(5) The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world. Its membership exceeds one thousand rabbis, and it is deeply involved in issues related to religious freedom.

(6) Torah Umesorah-National Society of Hebrew Day Schools is the coordinating body for more than 600 Jewish Day Schools across the United States.

(7) The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is the largest Orthodox Jewish synagogue organization in North America with over one thousand member congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

ARGUMENT

This *amicus* memorandum has one objective: to urge this Court not to delay, for procedural or technical reasons, in considering whether to overrule *Aguilar v. Felton*, 473 U.S. 402 (1985). In the decade since it was announced, that decision has wasted enormous public resources and crippled thousands of schoolchildren who need effective remedial programs to overcome learning disabilities. It has forced local school districts to conduct Title I programs in specially built movable classrooms that qualify as "neutral sites" at great public expense and has deprived children in certain schools — including many Jewish Day Schools — of remedial programs equivalent to those available to children enrolled in public schools.

A telling illustration of the effect of *Aguilar* was the situation of the schoolchildren in the Hasidic village of Kiryas Joel, which was before this Court in *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481 (1994). Because of the *Aguilar* decision, learning-disabled children in the Kiryas Joel School District were deprived of Title I programs until the New York Legislature adopted the statute that was before the Court in the *Kiryas Joel* case.

The colloquy between this Court and counsel representing Kiryas Joel demonstrated the effect of the 1985 decision on the issue:

JUSTICE O'CONNOR: One other question, preliminarily. I guess we wouldn't be here today but for this Court's decision in *Aguilar*.

MR. LEWIN: That's correct, Justice O'Connor. It's this Court's decision in *Aguilar* that precipitated the situation that required some action to be taken regarding the disabled children of Kiryas Joel.

QUESTION: If *Aguilar* —

QUESTION: And had we held —

QUESTION: Excuse me.

QUESTION: — otherwise, then the services would be provided with the Federal aid on the premises of the religious schools.

* * * *

JUSTICE KENNEDY: And these services had been provided in the private schools themselves, would you then nevertheless have had the constitutional option to have the district formed as it was here?

MR. LEWIN: No. If — we agree that if, in fact, the services were being provided under the pre-*Aguilar* procedure, there would not have been any justification for the legislature saying we have to accommodate or we have to take this step. Under those circumstances, there would be much more basis to argue that this is only being done to provide some kind of authority to these citizens who happen to be religious.

See also Kiryas Joel, supra, 114 S. Ct. at 2498 (O'Connor, J., concurring), 2505 (Kennedy, J., concurring), 2514-15 (Scalia, J., dissenting).

Every school year that *Aguilar* remains on the books means deprivation or diminution in remedial programs for thousands of children who need what Title I offers. The fear of harmful consequences expressed by this *amicus* and others, by the parties, and by the dissenters in *Aguilar* (see 473 U.S. at 419 (Burger, C.J.), 430-31 (O'Connor, J.)) have been exceeded by the actual experience of the last ten years. *Aguilar* has had a devastating effect. (United States Department of Education, August 1993, "Chapter 1 Services to Private Religious School Students: A Supplemental Volume to the National Assessment of the Chapter 1 Program.") No reasons of policy or legal niceties warrant subjecting thousands of additional children to more years of continued deprivation while a potential new case winds its way through the courts.

CONCLUSION

To paraphrase a motto made famous more than 2,000 years ago by Cato the Elder: "*Delenda est Aguilar.*" The sooner the better.

Respectfully submitted,

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